CRIMINAL LAW AND ITS ADMINISTRATION IN THE STATE OF NEW YORK.

ONE of the principal functions of government is the protection of persons and property from crime. The experience of centuries should enable statesmen and jurists to deal with crime with increasing efficiency. New conditions, however, breed new crimes. The growing density of population in cities and villages, and the increasing pressure of population upon the means of subsistence make the problem of crime more difficult of solution.

With the procession of the generations there is in this and other lands a constant advance in civilization and refinement. But yet masses of men in every large community are practically uncivilized. They are covered with but a thin veneering of civilization, and when that is scratched off a savage or barbarian is revealed. These masses are kept in order, not by conscience—not because they want to do right, but by force, the force which is known to be behind the law. When that force ceases to be dominant, brutal passions break their barriers and order and safety disappear. This was illustrated in the French Revolution, in the reign of the Commune in Paris, in the Draft Riots of 1863 in the City of New York, and is seen in the savagery so frequently practiced upon Negroes in the south—practiced because there is not force enough back of the law to deal with the situation.

To fit punishment to crime requires great wisdom. Two extremes must be avoided—too much severity and too much humanity. The former brutalizes, shocks the sense of justice, and renders conviction for crime difficult. The latter encourages crime. The sole legitimate purpose of punishment of criminals is the protection of society; and punishment for this end should be so inflicted as best to reform the criminal and to deter others inclined to crime. Many years ago, Lord Chief Justice Cockburn said: "It may well be doubted whether in recent times the humane and praiseworthy desire to restore and reform the fallen criminal may not have produced too great a tendency to forget that the potection of society should be the first con-

sideration of the law giver." When we notice how the criminal law in our country is administered in many cases, we are sometimes inclined to believe that the great object of the law is not to protect society, but to protect the criminal.

The criminal law has been much ameliorated within the last century. In the early part of that century it was still a capital crime in England to break down a mound of a fish pond whereby any fish escaped, or to cut down a cherry tree in an orchard, or to be seen for one month in the company of Gypsies, or to steal as much as twelve pence. There, less than a century ago, one hundred and sixty crimes were capital felonies without benefit of clergy, and somewhat earlier than that a prisoner was not entitled to a copy of the indictment, nor to counsel in cases of felonies. At first he could have no witnesses, but later he could call witnesses but not have them sworn, and yet Blackstone,[1] speaking of the right of peremptory challenges of jurors, said: "It is a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous."

But while the law was thus harsh and unjust to prisoners charged with crime, technicalities were permitted in the criminal practice which gave them almost their only chance of escape. The omission of some unimportant formality, the absence from the indictment of some unimportant word, the misspelling of a name or of other words, or something else equally frivolous was held to be a fatal defect. Some of these technicalities have been perpetuated to this time, long after the occasion for them has disappeared. One of the old aphorisms of the law, that ten guilty persons had better escape than that one innocent person should suffer, may be worked for more than it is worth, and breed undue caution in criminal trials. In providing for the general welfare—the greatest good to the greatest number—it frequently happens that the innocent must suffer. General laws frequently work hardship to individuals. Private property may be destroyed to stop a conflagration. The smallpox must be stamped out although persons who are well and not exposed to danger from the disease may be put to inconvenience. There is but slight danger that the inno-

[1] Vol. 2, p. 352.

cent will be convicted of crime. But their absolute protection cannot stand in the way of the general welfare. The guards thrown around a person charged with crime seem to be ample. His case must first be sifted through a grand jury. He is entitled to a public trial by a jury of his peers, to be informed of the charges against him, to sworn witnesses on his behalf, and to counsel to defend him in capital cases, at public expense in case he is without means. He enters upon his trial with the presumption of innocence in his favor, and the prosecution has the burden of establishing beyond a reasonable doubt every fact essential to the crime with which he is charged; and he generally has, particularly in capital cases, public sympathy in his favor. Our present law is so solicitous for a prisoner charged with murder that it not only requires the public, in case he is without means, to employ and pay counsel for his defense,[1] but in case of his conviction, it gives him the absolute right to appeal to the Court of Appeals in every case, requiring the county clerk to print the record for that court at public expense; and it goes still further in requiring the public to fee the counsel who argues his case upon the appeal.[2]

The case reaches the Court of Appeals, usually after a trial which has occupied a month or more, upon a record generally containing a multitude of exceptions taken by astute counsel during the long trial from the empanelling of the jury to the rendition of the verdict. A judge must be very wise and learned as well as very fortunate who upon such a long trial can escape error. How ought such a case to be treated upon appeal? It is provided in section 542 of the Code of Criminal Procedure that the Court of Appeals shall, in a criminal case, "give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." Should not a conviction in such a case be affirmed if, upon the legal evidence received upon the trial, the appellate court is well satisfied of the guilt of the defendant, although some illegal evidence was received? Should not the conviction be affirmed, although competent evidence offered by the defendant was excluded, if the court is satisfied that if such evidence had been received the verdict ought clearly

[1] Code Cr. Pro. sec. 308. [2] People *v.* Ferraro, 162 N. Y. 545.

to have been the same? The Court of Appeals seems to have answered these questions in the negative.[1] The law makers could make the rulings of the trial judge upon questions of evidence final, and when, upon all the legal evidence received and offered, the appellate court can clearly see that the defendant was guilty as charged, what substantial right will be violated by refusing him a new trial? It may well be doubted whether section 542 should not receive a more liberal construction in the interests of the general welfare.

The recent trial of Czolgosz, at Buffalo, was an illustration of what a criminal trial ought to be, and as an example, it cannot fail to be of great value to our country. It was orderly, dignified and brief, and yet all the rights of the defendant were conserved. If he had desired to make a defense and had employed his own counsel, the trial would probably have lasted at least a month, and then an appeal would have stayed the execution of the sentence for several months more, and probably at least a year would have intervened between the crime and its expiation. Thus justice would have been delayed, the general welfare in several ways sacrificed, with the only result to the defendant of prolonging for a few months his worthless life.

In view of modern conditions, particularly in murder trials, it seems to me that some reforms of the jury system ought to be made. I have set forth my views in reference to these at some length in a paper contributed to the Albany Law Journal of January, 1901. I shall close this paper by calling attention to them simply: Amend the constitution so that the trial judge can take a verdict from less than the entire twelve jurors when they are unable to agree, and also from the remaining jurors in the case of the death or serious illness of one or two; and amend the laws so as to confine the examination of jurors to test their qualifications to sit upon a trial to the presiding judge, leaving to the defendant his peremptory challenges as now. These reforms would leave an innocent person charged with crime all the protection he needs, and would make the administration of the criminal law less burdensome and more certain and speedy.

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[1] People *v.* Wood, 126 N. Y. 249; People *v.* Corey, 148 N. Y. 476; People *v.* Koernner, 154 N. Y. 355.